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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1133/84

[redacted]

BETWEEN HOLTS HOLDINGS LIMITED
Plaintiff

A N D CORREENE NORA BROWN-THOMAS
Defendant

LR 190

Hearing: 30 March 1987

Counsel: Huffin for Plaintiff

Judgment: 6 April 1987

JUDGMENT OF SINCLAIR, J.

On 8 December 1986 I delivered a judgment between the above parties holding that a lease dated 21 December 1978 was a valid lease binding both the Plaintiff and the Defendant. This then left the question of damages and costs to be dealt with and the matter came before me again on 30 March 1987 nearly 4 months after delivery of the initial judgment. In the interim no attempt has been made by any firm of solicitors to enter an appearance but on the morning of 30 March 1987, Mr Smith appeared stating that the firm by whom he was employed had been approached to act for the Defendant, that approach being made during the week commencing 23 March 1987. There was no indication prior to that particular week that the Defendant or her representatives had taken any steps in relation to the oustanding question of damages and costs. When Mr Smith sought leave to appear I enquired of him the nature of the defence he intended to advance this being necessary because counsel for the Plaintiff, somewhat naturally, because

of the delays which had already been experienced, wished to proceed. Mr Smith then informed the Court that it was the Defendant's desire to raise a defence arising out of the form of the assignment of lease which had been submitted by the Plaintiff to the Defendant at the time of a proposed sale to Mr D.H. Chapman. The defence which it was suggested was available was that the Defendant was being asked to consent to Mr Chapman and his wife executing a first mortgage in respect of the lease in favour of the Plaintiff and that by reason of that provision in the assignment, the Defendant was entitled to refuse her consent without giving any reason. I then indicated that I was not prepared to allow that particular defence to be developed as there had already been a finding in relation to the validity of the lease and this particular aspect had never been raised before. The only objection from the Defendant had been in relation to the use to which the Plaintiff had put the premises - and that is made plain in a number of documents which were referred to in Mrs Holt's affidavit. Nothing was ever produced to show that the Defendant in any way took exception to the form of the assignment which was submitted for the Defendant's approval. Accordingly Mr Smith then sought, and was granted, leave to withdraw and the matter proceeded on the damages issue. Before leaving this particular matter, I simply wish to draw attention to the letter written by Mr Baudinet on 21 August 1985 - which was after the assignment was submitted for approval - and in which reference was once again made to the purported non-observance by the Plaintiff of the use to which the premises could be put, and there is no reference in that letter to the matter now raised by Mr Smith.

The Plaintiff remains in possession of the premises although the Defendant sold her interest last year. The question is as to the manner in which the loss said to have been suffered by the Plaintiff is to be calculated. The original sale price to Mr Chapman and his wife was $70,000. Mr Chapman gave evidence that he was a willing purchaser and that a few days before the date of possession in relation to the sale to him, he received a telephone call from Mr Baudinet requesting that he and his wife visit him. On that occasion Mr Chapman deposed to the fact that Mr Baudinet wished him to take a new lease on condition that the Plaintiff be offered $20,000 less for the purchase of the business and also on condition that the Chapmans agree to an increase in the rental. However Mr Chapman declined to deal in that way as the property and the rental in respect thereto were subject to the Rental Freeze Regulations which were then in force. No assignment was forthcoming and in consequence on 30 August 1984 Mr Chapman stated that he and his wife elected not to proceed with the purchase. Mrs Holt gave evidence as to the turnover of the business and the fact that it included a figure of approximately $500 p.w. representing the sale of cigarettes. She stated that cigarette sales were not a high profit-line with the result that it did have some effect on the overall profit of the business. However, from the accounts which were produced for the years ended 31 March 1984, 1985 and 1986, it shows wages paid to the shareholders were $19,398, $18,664 and $16,598 respectively. There was no profit disclosed in the accounts in any of those years.

There was further evidence from Mr D.S. Yates who was one of the principals of Business Brokers (NZ) Ltd. He inspected the premises and the accounts of the business and came to the conclusion that as at the date of giving evidence he would have assessed the value of the business as being between $63,000 and $65,000 being $40,000 for plant and fittings, $20,000 for goodwill and between $3,000 and $5,000 for stock. This is, of course, less than the saleprice some three years ago but the lease now has three years less to run and the evidence from Mrs Holt was that no work had been done on the premises by the landlord during the last three years. It would then be reasonable to assess the value of the business at $64,000 as at the date of hearing.

How then is the loss, if any, to be established? The original sale price was $70,000 and one method may well be to ascertain over the years what the $70,000 would have earned if it had been prudently invested making due adjustment for taxation for each year since August 1984. The evidence from Mr D.J. Ross, a chartered accountant, was that the interest rates had fluctuated markedly over the period and in August 1984 they would have been in the region of 18% p.a. while now the rate could be upwards of 30% p.a. It was Mr Ross' view that the appropriate method to adopt was to consider the Consumer Price Index as at 7 August 1984 and compare that with the same index as at 31 March 1987 and any difference should be ascertained as a percentage. When that percentage was ascertained it should be applied to the sale price of $70,000 in order to assess the present value of that $70,000 as at 31 March

1987. According to Mr Ross' evidence, the Consumer Price Index figure as at 7 August 1984, being the date of the sale, was 1042 whereas the comparative figure as at 31 March 1987 was 1511, a difference of 473. Expressing the 473 figure as a percentage of the Consumer Price Index figure in August 1984 of 1042 gave a percentage increase of 45.39% and applying that percentage to the sale price of $70,000 gave a present value as at the date of hearing of $101,773.00, an increase of $31,773. If one then took the assessed value of the business as at today's date at $64,000, the difference would amount to $37,773 and that, it was contended, was the true assessment of the loss sustained by the Plaintiff.

There is, in my view, some foundation for approaching the Plaintiff's loss on this particular basis. This is not a case where the calculation is being made at a particular date with there being suggestions that there would be inflationary losses in the future which ought to be taken into account in making the assessment. That situation was one which was commonly experienced in personal injury damages cases and is typified by such cases as Mitchell v. Mulholland & Anor (No.2) (1971) 2 AllER 1025. There the Court held that evidence of future inflation relating to assumed national trends was too vague and speculative to be admissible. Indeed, in the course of the judgment of Widgery, L.J. he made it plain that when an award of damages was made at a particular date, it was not to be increased merely because the sum awarded might have decreased in real value in five or ten years time. Once the award had been made it was then over to the Plaintiff

to protect himself from the subsequent fall in the value of money by prudent investment. Those principles have been reaffirme as recently as 1984 as is illustrated by the decision in Auty & Ors v. National Coal Board (1985) 1 AllER 930.

However, the approach which has been adopted in this case by the Plaintiff is that it should have been in possession of the money in August 1984 and it then would have been able to act in its best interests by investing the money prudently but that it has been deprived of that opportunity because the sale, due to the actions of the Defendant, was not able to proceed. The Plaintiff has not had the ability to utilise the proceeds of sale at all and the value of the $70,000, if paid at that figure now, would be worth considerably less than had the $70,000 been paid in August 1984. It is for that reason that it is contended that as the rate of inflation can now be accurately assessed and instead of being a projected assessment on vague assumptions, the Plaintiff is now able to resort to the method which has been adopted in the instant case by Mr Ross namely by paying due regard to the Consumer Price Index figures. I am of the view that in the instant case this is an appropriate method of calculation of loss and it avoids the necessity to speculate at what figure the Plaintiff may have invested the $70,000 had it been available in August 1974 and whether that investment would have been on short or long term having regard to the state of the money market at any particular time. It also avoids the complexities which arise when one has to compound the capital figure from time to time to take into account net interest earned over

a particular period and thus assessing what the new capital sum is which would be available for investment at any given time.

Accordingly I am prepared to hold that having regard to the figures which have been presented, the Plaintiff has established a loss of $37,773 and there will therefore be judgment for it in that sum. At the hearing counsel for the Plaintiff also sought to recover interest but he recognised that if the Court did adopt the assessment of damages he contended for, then an element of interest was already included in the assessment. I am of the opinion that it would be quite inequitabl in the circumstances, to allow interest in addition to the assessed damages because the assessment does in effect take into account interest which would have been earned had the $70,000 been available to the Plaintiff in August 1984. The claim for interest is, therefore, disallowed.

This then leaves the question of costs. There have been two hearings and the total time of hearing would have been less than a full day. As it transpired, because of the attitude of the Defendant and her adviser, the hearings were undefended and there were no interlocutory proceedings at all. In all the circumstances, I think it appropriate to allow the sum of $1500 for costs to cover both hearings and in addition the Plaintiff is entitled to disbursements and witnesses expenses as fixed by the Registrar.

Solicitors:

Meredith Connell & Co, Auckland, for Plaintiff.